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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. BRYAN T. LIDRAZZAH, Defendant and Appellant.	D059922 (Super. Ct. No. SCD223171)

APPEAL from a judgment of the Superior Court of San Diego County, David J. Danielsen, Roger W. Krauel, and Michael T. Smyth, Judges. Affirmed.

Bryan Lidrazzah appeals from a judgment convicting him of nine counts of various sex offenses based on his sexual misconduct against two young girls. He argues the judgment must be reversed because the trial court abused its discretion in denying his *Marsden*[1] requests for new counsel. He also asserts his convictions of unlawful sexual intercourse and sodomy must be reversed because the trial court failed to instruct on the

1 *People v. Marsden* (1970) 2 Cal.3d 118.

lesser included offenses of attempted sexual intercourse and attempted sodomy. We reject these contentions of reversible error and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

One of the victims in this case (S) was subjected to ongoing molestation by defendant while defendant lived with S's family. The second victim (J) was sexually touched by defendant on one occasion when defendant wandered into a church hall.

Molestation of S

Defendant molested S when she was between the ages of about six and eight. In addition to defendant, S lived with her mother (Mother), her two brothers, and Mother's boyfriend, who is defendant's brother. Defendant slept on the couch downstairs, and S shared an upstairs bedroom with her twin brother. Mother, Mother's boyfriend, and S's baby brother shared another upstairs bedroom.

S initially reported the molestations in 2007 (at age six), when she was removed from her home by Child Protective Services due to allegations unrelated to the molestation. Later S recanted the molestation allegations and she was returned to her home. However, two years later in 2009 (at age eight), she repeated the molestation claims when she was again removed by Child Protective Services.

During an in-depth interview on May 13, 2009, S told the social worker that defendant "keeps touching" her on her "privates," and he usually did this in her bedroom at night. S stated that defendant came in her room while she was lying on her stomach on her bed watching television. He pulled down his clothes to his legs; pulled down her underwear and pants to her legs; and touched her private part (where her "peepee comes

out") with his private part. She did not see his private part but felt it. Sometimes his private part would hurt when it was "pushing [her] private part." At trial, she testified that when he touched her front private part with his private part, sometimes her clothes were on and sometimes he took them off of her. "Blood" came out his front private part and it felt wet, and she saw the wet blood while he was touching her front private part with his private part. When his front private part touched her front private part it hurt on the inside of her while it was happening.

S also told the social worker that his private part pushed in her "butt"; "slimy stuff" went in her butt; and the pushing would make her butt hurt. At trial, she testified he touched her back private (i.e., her "behind") with his front private when she was upstairs in her bedroom.

S stated these incidents occurred multiple times; defendant told her not to tell anyone; and she did not tell anyone because she was "too shy."

S also described incidents of oral copulation and lewd conduct. She said that defendant had her "[s]uck his private part," and his private part "looked like a big worm." He touched her private part with his hand more than 10 times, and they did "tongue" kissing by putting their tongues in each other's mouths. On one occasion he carried her downstairs and "humped" her with their clothes on by pushing his private part on her butt.

Forensic testing showed that defendant's DNA matched DNA in semen or sperm stains found on S's pajama bottoms and underwear.

Molestation of J

On the evening of October 2, 2009, defendant walked into a church hall and touched a five-year-old girl (J) who was sitting at a table by herself playing with toys that were set up for a rummage sale. A church member, Patricia Cueva, saw defendant looking at the items on the table and then move closer to J. He then leaned towards J and reached over with his arm, "basically invading [J's] space," which caused J to lean back. Defendant leaned towards J a second time and then bent down as if he was looking at items that were under the table. As he was getting back up, his arm and hand were in front of the lower part of J's body making a "swiping motion," causing J to lean back again. Feeling suspicious, Cueva moved closer to J. Cueva saw defendant bend down again and make the same quick swiping motion with his hand from J's thighs to just above her "crotch." Cueva's "alarm went off" and she went over and stood right behind them so defendant knew she "saw something." J got up and went to her grandmother in the church kitchen, and defendant left the church hall.

Cueva called 911 and solicited help from other people at the church to apprehend defendant until the police arrived. When interviewed, J indicated to the authorities that defendant, whom she did not know, touched her vaginal area.

Jury Verdict and Sentence

Concerning S, the jury convicted defendant of three sexual offenses by a person over age 18 with a child age 10 or younger, including sexual intercourse (Pen. Code,[2]

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2 Subsequent unspecified statutory references are to the Penal Code.

§ 288.7, subd. (a), count 1); sodomy (§ 288.7, subd. (a), count 2); and oral copulation (§ 288.7, subd. (b), count 3). The jury also convicted him of five counts of lewd act on a child under age 14 (§ 288, subd. (a)) based on rubbing S's vagina (counts 4 through 7) and rubbing her buttocks (count 8). Concerning J, the jury convicted defendant of one count of lewd act on a child under age 14 (§ 288, subd. (a), count 9). For both victims, the jury found true allegations of substantial sexual conduct with a victim under age 14 (§ 1203.066, subd. (a)(8)) and there was more than one victim (§§ 667.61, subd. (b), (c), (e), 1203.066, subd. (a)(7)).

Defendant received a 25-years-to-life sentence for count 1 sexual intercourse against S; a consecutive 15-years-to-life sentence for count 9 lewd act against J; and a six-year determinate term for count 8 lewd act against S. The remaining counts were sentenced concurrently.

DISCUSSION

I. Denial of *Marsden* Motions for New Counsel

Defendant contends the trial court abused its discretion by denying his repeated requests for new counsel because the record shows a breakdown in the attorney-client relationship likely to result in ineffective representation.

A. *Background*

1. *The First* Marsden *Hearing*

On March 3, 2010 (prior to the preliminary hearing), defense counsel (Attorney Damian Lowe) requested a competency evaluation for defendant because he had

developed doubts about defendant's competency.[3] After defense counsel made this request, defendant told the court he did not feel he was getting proper advice from his attorney and he wanted to fire his lawyer to see if he could get another public defender who could represent his case "a little better." In response to defendant's request for new counsel, the court conducted a *Marsden* hearing.

At the *Marsden* hearing, defendant told the court:

> "I feel that if I was represented better, I wouldn't be offered a 20-year deal. And I tried discussing it with this guy right here, and it hasn't dropped any lower. [¶] And I just—I don't feel that guilty. I haven't been able to review the case as much as I want. I haven't got the understanding from him. I know what he's talking about, but I just have not been able to go over the case and understand what the best plea bargain—or what it would be—for me to make the right choice at this point."

Defendant elaborated that his family felt that he should not get more than three to six years, and it sounded like "way too high a risk for [him] to go any further with this guy."

The court asked defendant what his counsel had failed to do that might have gotten him a better plea bargain offer. Defendant responded that he needed "someone to somehow discuss it the right way" for him, and his counsel might have been able to get

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[3] Lowe explained that although he did not initially have concerns about defendant's competency, he developed a "growing concern" after several conversations with defendant. Lowe's investigation of defendant's mental health history revealed that about two years earlier defendant was seen at a hospital for "hearing voices" and he subsequently received some services.

him into a program, get him placed on probation, or have him "do . . . a few years . . . ."[4]

After listening to defendant's response, the court stated it did not see any reasonable basis to discharge counsel at this time, but it would "defer any further exploration" of any *Marsden* issues until after a competency evaluation had been completed.[5]

2. *The Second* Marsden *Hearing*

On April 12, 2010, after reviewing the report of the competency evaluator, the court found defendant was competent to stand trial. The preliminary hearing was held on May 6, 2010, and defendant was bound over for trial. Defendant was arraigned on May 10, 2010; a readiness conference was held on July 19, 2010; and the trial date was set for October 19, 2010.

On September 23, 2010, defendant requested another *Marsden* hearing. At the hearing, defendant stated he had his current attorney "for a whole year"; he did not feel they had been agreeing and he would like a "second opinion"; he did not want to leave

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4 Defendant also stated, in somewhat unresponsive fashion, that there was a "CPS case" with $3,000 bail; he has never had any charges like this before; he just turned 26 and he missed his birthday and Christmas; it just hit him that after this he might not be able to find a job; the charges sounded "really serious"; he had never "fought a case like this before"; and he did not want to "chance it like this."

5 With respect to the competency evaluation, the court stated that—although it might not be reflected in the transcribed record—the manner in which defendant was behaving and talking created "grave concerns" about his competency. The court noted that defendant's comments, although appearing goal directed, were "completely out of sync with the reality" of the case.

his life in his attorney's hands and risk being "locked up for that long"; and if he had a different public defender he might be able to "actually come to some type of agreement."

Further, defendant stated he did not feel that he and his attorney had been "getting along"; they were "not cooperating too well"; he wanted an attorney who would have a better understanding of how he felt and what he needed; and he disagreed so strongly with his attorney's view of the case that he did not want to go to trial with him or "sign a deal with him." He elaborated that in the beginning when they discussed the charges, his attorney told him he thought defendant was guilty, and defendant did not think this was a proper way for an attorney to "start off meeting somebody." He said he did not think he was going to get a life sentence because he was not guilty; if he wanted to go to trial and lose this was not up to his attorney; and he did not want any more problems or arguments and with a new attorney "maybe [they] could see eye to eye."

Defendant also complained his attorney had "missed a few appointments"; had not shown up "for months at a time"; and then he would "finally show up." He wanted an attorney who "was stronger along with [his] case" who would show up "more often than just like once every other month . . . or once in a while." Also, his attorney had asked for a competency evaluation, which defendant did not necessarily want.

Attorney Lowe's Response

When queried by the trial court, Attorney Lowe stated he had been a public defender since 1994 and had been assigned to felony cases since 2006. He had been representing defendant since October or November 2009; he had reviewed the information, the discovery, and the reports; he had visited the scene; and he had met with

defendant to assess whether the case should go to trial. Defendant was facing life sentences under several of the charges, and based on the evidence (including the DNA evidence) Lowe had concluded defendant would likely lose at trial and get a life sentence; accordingly he had been persistently trying to work with defendant to reach a resolution other than trial. Also, due to his concerns about defendant's competency, he obtained the competency evaluation and had defendant evaluated by a defense psychologist; however, he felt defendant "was not open" during those evaluations and the results were "compromised."

Lowe opined that defendant's interpretation of his assessment of the case and what he was trying to do for defendant was "obviously something [defendant] doesn't agree with necessarily." Lowe stated he felt that defendant "for reasons not his own fault" needed more time than other people to "fully appreciate what he's facing"; Lowe had been doing his best to work with defendant to explain the reasons behind his thinking about what was best for defendant; and they obviously had disagreements about that.

Lowe concluded:

> "I don't know that—I mean, maybe we're at the point where [defendant] has completely lost trust in me because of my approach. I don't know. But I can't change what I think is going to happen to him, should we go to trial. I can't change what I think is best for him in this case. [¶] I understand that it is his decision as to which way this case goes and ultimately must abide by that decision. But I also feel it's my duty to advise him as best I can if I think he's misguided. And that's what I'm trying to do."

Lowe told the court he had had cases where he advised his client to accept a plea bargain offer but the case went to trial because the client refused, and he did not litigate these cases any less aggressively than he would otherwise have done.

Trial Court's Ruling

The court denied defendant's request for a new attorney, finding that Lowe had properly represented defendant and would continue to do so. The court stated defendant had rejected the plea offers and wanted to go to trial; his attorney expressed no hesitation or limitation about doing so and thus was doing what defendant was asking him to do; and his attorney was prepared for and capable of trying the case "as well as any other attorney and better than most." The court commented it was not unusual for an argument to arise when an attorney presents "bad news" to the client based on his or her evaluation of the case and the client is not prepared to accept this; this did not mean the attorney was not doing his or her job; to the contrary, it was the attorney's job to tell the defendant about the attorney's evaluation of the case; and Lowe has been doing this for 16 years and defendant needed his opinion even if he did not agree with it.

The court stated it was unfortunate when an attorney misses meetings but sometimes this occurs because the attorney is working on other cases; there was nothing to suggest that Lowe's caseload was interfering with his performance of his duties in defendant's case; and it appeared that he had balanced his other cases and was prepared to take the case to trial as directed by defendant. Further, Lowe had been "proactive" and made a full assessment of defendant's "mental circumstances" through the competency evaluations.

The court explained that the fact that defendant "might be more comfortable with another lawyer" was not enough to permit appointment of new counsel, and although defendant's discomfort was "not insignificant," the court was evaluating whether he was

getting the representation he should be getting. Further, a personality dispute was not enough to justify a new lawyer "unless there's no talking back and forth." The court found that although there were some arguments between defendant and Lowe, the conflict was "not such that the attorney is unable to communicate to the defendant."

3. *The Third* Marsden *Hearing*

After the court's ruling at the second *Marsden* hearing, the trial date was reset for March 29, 2011. On March 29, jury voir dire commenced. During the voir dire proceedings on March 30, defendant requested another *Marsden* hearing. At the hearing, defendant stated he had been experiencing difficulties with Lowe since he was assigned to his case, explaining:

> "[I]t seems like it's either going the way that I like it to and then it doesn't, so I just—I don't want him to have my life in his hands because I already told him I'm innocent, I'm not guilty. And I don't see there is any reason I should be facing life charges. [¶] I thought there would have been a better deal, maybe three or six years."

Defendant also stated he did not feel he could trust his attorney; they did not "even get along enough" for defendant to be able to explain his case thoroughly and for his attorney to represent him "in a defense where [he'd] be able to win"; he did not feel the case "should have been dragged out this far"; his attorney was "not helping [his] case out"; and he wanted "a better lawyer that would support the way" he felt.

Defendant also complained because Lowe had excused an African-American from the jury during voir dire, and defendant wanted an African-American on the jury. Defendant stated: "It's like he just like grabbed me . . . , like I'm his property . . . . And I really feel like this guy, like he must not like Black people. And then it's like I asked him

does he have a problem with Black people . . . . I feel like I have a big percent of being Black, and I didn't really appreciate that."

In response, Lowe stated he and defendant had disagreed about certain things about his case and how to proceed; they had "discussed these disagreements at length" since the commencement of his representation; and it often came to the point where they could not resolve their disagreement as to what was best. Lowe said that "as time has gone on these things have obviously grown to bother [defendant] more and more"; he respected and understood that; and there was no reason why defendant had to agree with him. However, as he had told defendant "on multiple occasions and [as he] did today," everything he did was in an effort to help defendant.

Concerning the African-American juror, Lowe said defendant had told him that he was not happy with the composition of the jury because there were no African-Americans on it, and Lowe shared this concern. However, when Lowe thereafter challenged the only African-American who had been called to the panel, this was only one of many concerns he took into consideration when exercising challenges and there were reasons why he did not think this particular juror would be good for the defense. Because this juror was the only African-American, before excusing him Lowe asked defendant if it would be "okay" to do so; defendant said "okay"; and after he excused him defendant became upset. Lowe reiterated he did not think defendant had to agree with him on everything, but he had told defendant it was his job to make these decisions and he did them "to the best that [he could] for [defendant's] best interests." Lowe told the court that he felt he could continue to effectively represent defendant.

The trial court denied the request for new counsel, finding there was no showing defendant's attorney was unable to provide him with effective representation. The court commented that although it understood defendant's concerns because he was not accustomed to being charged with these kinds of offenses, it was not uncommon for a defendant to disagree with some of his attorney's tactical decisions because they viewed the case from different perspectives, and Lowe's views on jury selection were based on years of trial experience.[6]

B. *Analysis*

A defendant is entitled to new appointed counsel if the record clearly shows the first appointed attorney is not providing adequate representation or there is such an irreconcilable conflict between defendant and counsel that ineffective representation is likely to result. (*People v. Valdez* (2004) 32 Cal.4th 73, 95.) Tactical disagreements between the defendant and counsel do not by themselves constitute an irreconcilable conflict. (*Ibid*.) " 'When a defendant chooses to be represented by professional counsel, that counsel is "captain of the ship" and can make all but a few fundamental decisions for the defendant.' " (*Id.* at p. 96.) Further, even a disagreement over fundamental decisions that are controlled by the defendant does not necessarily require the appointment of new counsel. (*People v. Williams* (1970) 2 Cal.3d 894, 905; *People v. Clark* (2011) 52 Cal.4th 856, 912 [disagreement over whether to plead guilty did not alone show adequate basis for substitution of counsel].)

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6 The court also stated the request for new counsel was untimely, but in any event decided the request on the merits.

Similarly, a defendant's claims of lack of trust or inability to get along are not alone sufficient to show an irreconcilable conflict. (*People v. Myles* (2012) 53 Cal.4th 1181, 1207.) " 'If a defendant's claimed lack of trust in, or inability to get along with, an appointed attorney were sufficient to compel appointment of substitute counsel, defendants effectively would have a veto power over any appointment, and by a process of elimination could obtain appointment of their preferred attorneys, which is certainly not the law.' " (*Ibid*.) New counsel is required only when there is "a breakdown in the attorney-client relationship of such magnitude as to jeopardize the defendant's right to effective assistance of counsel." (*People v. Williams, supra*, 2 Cal.3d at p. 905.) Further, if counsel is prepared for trial, complaints about the number of times counsel has met with the defendant do not alone warrant appointment of new counsel. (*People v. Valdez, supra*, 32 Cal.4th at p. 96; *People v. Hart* (1999) 20 Cal.4th 546, 604.)

Once a defendant is afforded an opportunity to state his or her reasons for seeking to discharge an appointed attorney, the decision whether to appoint new counsel lies within the discretion of the trial court. (*People v. Myles, supra*, 53 Cal.4th at p. 1207.) The trial court may make its own observations, appraisals, and credibility resolutions concerning the conflicts and communication issues in the attorney-client relationship. (*People v. Clark, supra*, 52 Cal.4th at p. 918; *People v. Jones* (2003) 29 Cal.4th 1229, 1245.) The court does not abuse its discretion in denying a *Marsden* motion unless the defendant has shown that a failure to replace counsel would substantially impair the defendant's right to effective assistance of counsel. (*People v. Myles, supra*, 53 Cal.4th at p. 1207.)

The fact that Lowe told defendant that in his view it was likely defendant would be found guilty and be sentenced to life in prison if he went to trial (whereas defendant thought he was innocent and did not think this would occur), does not show an irreconcilable conflict likely to result in ineffective representation. Lowe was properly performing his duty to candidly advise defendant about his evaluation of the case so defendant could make an informed plea bargaining decision. Lowe told the court that he was prepared to go to trial and would fully litigate the case notwithstanding his advice to defendant not to go to trial, and the court was entitled to credit this statement based on its own observations and knowledge of Lowe's performance during the proceedings. The court could also reasonably conclude that defendant's expectation that another attorney might be able to negotiate a better plea bargain deal (i.e., three to six years instead of 20) was unrealistic and showed no deficiency on Lowe's handling of the negotiations.

Further, the record supports the court's finding that Lowe and defendant were continuing to communicate and their disagreements did not result in a such a large breakdown in their relationship as to jeopardize the effectiveness of Lowe's representation. The trial court could credit Lowe's statements reflecting their ability to communicate was still intact. At the second *Marsden* hearing Lowe stated he continued to try to explain his reasons for his decisions and advice to defendant, and at the third *Marsden* hearing Lowe stated they had discussed their disagreements at length, he repeatedly told defendant his decisions were designed to help defendant, and he communicated with defendant before excusing the African-American juror. Lowe's statements also reflected that he maintained a professionally-appropriate attitude

concerning defendant's state of mind; i.e., Lowe believed that defendant, through no fault of his own, needed more time than others to appreciate what he was facing; Lowe explained to defendant that all his decisions were designed to help defendant but he understood defendant was not required to agree with his decisions; and Lowe understood he had to ultimately abide by defendant's decision about going to trial.

To the extent defendant claimed the problems with Lowe prevented defendant from adequately reviewing his case or explaining his case to Lowe, the trial court could reject the accuracy of defendant's perceptions based on the court's assessment that Lowe was fully representing defendant's interests and was not derelict in his duty to discuss the case with defendant. Under these circumstances—showing that Lowe was fully committed to representing defendant's interests and was striving to effectively communicate with defendant—the fact that defendant did not feel that he could trust or get along with Lowe and that they had disagreements did not require the court to appoint new counsel.

Defendant's complaints about his counsel's request for a competency evaluation and dismissal of the African-American juror concern decisions that are properly within counsel's control and provide no basis for appointment of new counsel. Further, counsel's strategic decision to dismiss the African-American juror does not alone show racial bias; as defense counsel pointed out, there are many reasons that affect an attorney's jury selection choices. Also, defendant's complaints about missed appointments and inadequate meetings with his counsel do not suffice to show a need for new counsel. Based on the showing that Lowe was prepared to go to trial, defendant's mere wish for

more time with his counsel does not show ineffective representation or a breakdown in the relationship likely to result in ineffective representation.

The trial court did not abuse its discretion in denying defendant's requests for new counsel.

II. *Failure To Instruct on Lesser Included Offenses*

Defendant argues the trial court erred in failing to sua sponte instruct the jury on attempted sexual intercourse and attempted sodomy as lesser included offenses of counts 1 and 2. Defendant asserts S made equivocal statements regarding whether he actually penetrated her, and reasonable jurors could conclude he did not do so.

A trial court has a sua sponte duty to instruct on a lesser included offense "whenever there is substantial evidence raising a question as to whether all of the elements of the charged greater offense are present." (*People v. Huggins* (2006) 38 Cal.4th 175, 215.) Substantial evidence in this context is evidence from which a jury composed of reasonable persons could conclude that the lesser offense, but not the greater, was committed. (*Ibid*.) If the evidence in support of the lesser offense is "minimal and insubstantial," the court need not give the instruction. (*People v. Cooksey* (2002) 95 Cal.App.4th 1407, 1410.) When evaluating whether a lesser included offense instruction should have been given, we construe the evidence in the manner most favorable to the defendant and apply an independent standard of review. (*People v. Manriquez* (2005) 37 Cal.4th 547, 584-585.)

To establish the offenses of unlawful sexual intercourse or sodomy, the penetration of the victim need only be slight. (§ 263 ["Any sexual penetration, however

slight, is sufficient to complete the crime" of rape]; § 286, subd. (a) ["Any sexual penetration, however slight, is sufficient to complete the crime of sodomy."].) For unlawful sexual intercourse, penetration of the vagina is not required; rather, penetration of the labia majora suffices. (*People v. Dunn* (2012) 205 Cal.App.4th 1086, 1097.) Sodomy requires "contact between the penis . . . and the anus" and penetration of the anus may be slight. (§ 286, subd. (a).)

In support of his contention there was sufficient evidence to warrant lesser included offense instructions based on lack of penetration, defendant cites portions of S's statements where she responded in an unclear fashion; stated nothing occurred; or stated she did not know or remember what had occurred. For example, when the social worker asked if defendant's "private part" went inside or on the outside of her "butt," S gave an "[u]nintelligible" answer. Also, when queried by the social worker, she said she did not know what his or her private parts felt like when his private part was touching her private part; defendant did not do anything to her butt; and she did not know what happened to her butt or how the "slimy stuff" got on her butt. At trial when questioned by the prosecutor, she testified she did not know if her clothes were on or off when he touched her front private, and she did not remember such things as whether his front private went inside her front private or whether she told the social worker this; what his private felt like when it touched her front private; if he touched the dry or wet part of her front private; if it hurt when he touched her butt with his front private; and if she told the social worker it felt like he was pushing inside her butt and it hurt. S also responded to

numerous other questions in this same fashion, saying she did not know or did not remember.[7]

However, as set forth in our summation of the facts, at other points S described the touchings in a manner that clearly reflected the slight penetration required for the sexual intercourse and sodomy charges. Concerning sexual intercourse, she told the social worker his private part was pushing her front private part and sometimes it hurt.[8] Two years later at trial, she provided an unmistakable description of sexual intercourse, testifying that when his front private touched her front private it hurt on the inside while it was happening.

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[7] For example, S answered that she did not remember or did not know if defendant's front private touched her front private; what part of his body touched her front private; if anything came out of his front private; whether wet stuff touched her body; what part of his body touched her butt; whether he took her clothes all the way off; what his front private looked like when he asked her to put her mouth on it; whether she put her mouth on his front private; whether his hands touched her front private; and where in the house the touchings occurred.

[8] The following colloquy occurred between the social worker (SW) and S: "[SW]: . . . How do you know he was touching your private part with his private part? [S]: I felt it. . . . [SW]: . . . Was there ever any like, any hurting? [S]: Sometimes. [SW]: . . . *What would be happening that . . . would make it hurt*? [S]: *His private*. . . . [SW]: And what would his private be doing? [S]: Um, *pushing my private part*." (Italics added, paragraph indicators omitted.)

Concerning sodomy, S told the social worker that defendant's private part was pushing in her butt; slimy stuff went in her butt; and the pushing made her butt hurt.[9] Her trial testimony concerning sodomy was less clear; i.e., she testified he touched her butt with his front private, but she could not remember if it hurt when he did this or if she told the social worker that it felt like he was pushing inside and it hurt. However, when her testimony is read in context, the record does *not* show that she was affirmatively claiming she was unsure about what occurred. She testified that she tried to tell the social worker the truth, and her trial testimony did not provide any descriptive information that contradicted the straightforward description of sodomy she provided to the social worker. In short, there is nothing in S's testimony suggesting she did not answer accurately when interviewed by the social worker.

Viewing the evidence in its totality, S's statements saying nothing occurred or that she did not know or did not remember matters related to the molestation (including the penetration aspect) reflect a young child's recluctance to talk about the subject or fading memory due to the passage of time. Given that she described facts consistent with

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9 The colloquy was as follows: "[SW]: . . . . And did something come out of his private part?. . . [S]: Some slimy stuff. . . . [SW]: . . . . *Where'd the slimy stuff go*? [S]: In my private. . . . *In my butt.* [SW]: . . . . In your butt and your private or just your butt? . . . [S]: My butt. . . . [SW]: . . . . Would his private part ever like do anything to your butt? [S]: Uh, yeah. . . . Push. . . . [SW]: . . . . Was there ever hurting to your butt? [S]: Yeah. [SW]: . . . . And *what would he be doing that would make your butt hurt*? [S]: *Pushing . . . his private part in my butt.* [SW]: Pushing his private part what? [S]: To my butt. . . . [SW]: When you say to your butt, do you know if his private part ever went like inside of your butt or on the outside of your butt or? [S]: (Unintelligible)." (Italics added, paragraph indicators omitted.)

penetration when she *did* talk about what occurred, any contrary inference from her nondescriptive answers was minimal and insubstantial. Under these circumstances, the trial court was not required to instruct on the lesser included offenses of attempted sexual intercourse and attempted sodomy.

Alternatively, even assuming arguendo the court should have instructed on the attempted offenses, there was no prejudice because there is no reasonable probability the jury would have reached a different outcome absent the error. (See *People v. Prince* (2007) 40 Cal.4th 1179, 1267.) The rationale for requiring instruction on lesser included offenses is to avoid forcing the jury into an "'unwarranted-all-or-nothing choice'" which creates the risk the jury will convict on the charged offense even though one of the elements remains in doubt because "'the defendant is plainly guilty of *some* offense . . . .'" (*People v. Hughes* (2002) 27 Cal.4th 287, 365.) However, the failure to give the jury the lesser offense choice does not require reversal when the evidence supporting the greater offense is sufficiently strong that it is unlikely that a properly-instructed jury would have selected the lesser offense. (See *People v. Moye* (2009) 47 Cal.4th 537, 556.)

Here, once the jury credited S's claims that defendant molested her, it is not reasonably probable that it would have rejected penetration findings had it been instructed on the attempted offenses. S's statements that defendant was pushing her genital and anal areas with his penis and that this hurt her constituted compelling evidence that at least slight penetration occurred.

The lack of prejudice is further supported by the manner in which the case was charged, which did not present the jury with an all-or-nothing choice of convicting or acquitting if it had doubts about the penetration element for counts 1 and 2. Because defendant was also charged with lewd act counts for rubbing the victim's vagina and buttocks, the jurors could have returned guilty verdicts on these offenses and found him not guilty of the sexual intercourse and sodomy counts if they were not satisfied that penetration had been proven beyond a reasonable doubt. Thus, this is not a case where the failure to instruct on a lesser included offense created a substantial risk that the jury might be tempted to convict on the charged offense notwithstanding doubts as to an element to avoid allowing a defendant to entirely escape responsibility for his or her misconduct.

To support his claim of reversible error, defendant contends the jurors were focused on the "evidentiary deficit" concerning penetration because during deliberations they submitted a note to the court asking: "Can you provide a legal definition of penetration as it relates to sexual intercourse and sodomy[?]" The court's response stated: "The word penetration is to be applied using its ordinary, everyday meaning, which is 'the act or process of passing, extending, or piercing into or through something.' "[10] The jurors' question does not necessarily reflect that they had doubts about whether there was

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10 The court also directed the jury to the instruction stating that for sexual intercourse any slight penetration of the vagina or genitalia sufficed. The instructions provided to the jury stated: "Sexual intercourse means any penetration, no matter how slight, of the vagina or genitalia by the penis," and "Sodomy is any penetration, no matter how slight, of the anus of one person by the penis of another person."

any penetration at all, but could merely indicate that they were inquiring whether there was a legal definition of penetration that was more precise than that set forth in the instructions.

In any event, regardless of the jury's question concerning penetration, we are satisfied that instructions on the attempted offenses would not have caused the jury to select them instead of the completed offenses. As stated, once the jury believed that S was molested by defendant, her description of the pushing and the pain she felt during the molestation targeted at her genital area and buttocks constitutes eminently persuasive evidence that defendant achieved some slight penetration. There is no reasonable probability that the absence of the lesser included offense instructions affected the guilty verdicts on counts 1 and 2.[11]

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11 Defendant requests that we apply the harmless beyond a reasonable doubt standard for federal constitutional error. As he acknowledges, the California Supreme Court has held that the erroneous failure to instruct on a lesser included offense is generally reviewed under the state law standard of a reasonable probability of a different outcome. (*People v. Prince, supra*, 40 Cal.4th at p. 1267.) Our high court has recognized there may be exceptions where the stricter federal standard applies, i.e., when the omitted instruction "embod[ied] the defense theory of the case" and hence the omission "violated the defendant's due process right to present a complete defense." (*People v. Rogers* (2006) 39 Cal.4th 826, 872.) This is not such a case. Defense counsel argued for an acquittal based on the theory that defendant did not molest S at all, and he did not present the theory that if there was molestation there was no penetration. In any event, we would reach the same conclusion of no prejudice even if we were to apply the federal constitutional standard.

DISPOSITION

The judgment is affirmed.

HALLER, J.

WE CONCUR:

McCONNELL, P. J.

IRION, J.